

ESTTA Tracking number: **ESTTA599937**

Filing date: **04/22/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212477
Party	Defendant GFA Brands, Inc.
Correspondence Address	MARTA S LEVINE QUARLES & BRADY LLP 411 E WISCONSIN AVE, SUITE 2350 MILWAUKEE, WI 53202-4461 UNITED STATES tm-dept@quarles.com, johanna.wilbert@quarles.com, dav- id.cross@quarles.com, DRC@quarles.com, marta.levine@quarles.com, jwil- bert@quarles.com
Submission	Other Motions/Papers
Filer's Name	Johanna M. Wilbert
Filer's e-mail	johanna.wilbert@quarles.com, deena.rafinski@quarles.com
Signature	/Johanna M. Wilbert/
Date	04/22/2014
Attachments	2014-4-22 GFA Brands Inc _s Disclosure of Expert Philip Johnson.pdf(396658 bytes )

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

---

In the Matter of Application Serial No. 85/751,520: EARTH BALANCE  
Published for Opposition March 19, 2013

---

BALANCE BAR COMPANY

Opposer,

v.

**Opposition Nos. 91212477**

GFA BRANDS, INC.

Applicant.

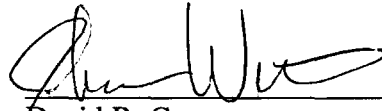
---

**GFA BRANDS, INC.'S DISCLOSURE OF EXPERT PHILIP JOHNSON**

---

Pursuant to Fed. R. Civ. P. 26(a)(2) and 37 C.F.R. §2.120, GFA Brands, Inc. hereby gives notice that it discloses Philip Johnson as a witness who may be used to present expert testimony in the above-captioned matter. An expert report and the other required disclosures by Mr. Johnson are set forth in the attachment, and were provided to counsel for Opposer via e-mail and first class mail on Tuesday, April 22, 2014, as required by the schedule previously set in this proceeding.

Dated this 22nd day of April , 2014.



David R. Cross

Marta S. Levine

Johanna M. Wilbert

Quarles & Brady LLP

411 East Wisconsin Avenue

Milwaukee, Wisconsin 53202-4497

Telephone: (414) 277-5495

Facsimile: (414) 978-8942

Email: DRC@quarles.com

Email: marta.levine@quarles.com

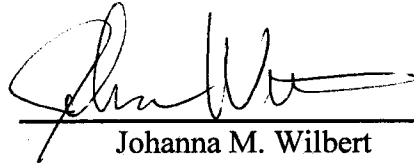
Email: jwilbert@quarles.com

*Attorneys for Applicant GFA Brands, Inc.*

**CERTIFICATE OF SERVICE**

A copy of the foregoing GFA Brands, Inc. Disclosure of Expert Philip Johnson along with a copy of Mr. Johnson's report and required disclosures were served on this 22nd day of April 2014, via regular U.S. Mail, with e-mail courtesy copies upon:

Dated: April 22, 2014

  
\_\_\_\_\_  
Johanna M. Wilbert

*Attorney for Applicant*

# JJG Group <sup>LLC</sup>

---

**BALANCE BAR COMPANY**

**(OPPOSER)**

**V.**

**GFA BRANDS, INC.**

**(APPLICANT)**

**A STUDY OF LIKELIHOOD OF CONFUSION**

April 2014

HIGHLY CONFIDENTIAL

## **TABLE OF CONTENTS**

	<u>Page</u>
I. BACKGROUND .....	1
II. INTRODUCTION .....	2
III. METHODOLOGY .....	4
IV. RESULTS .....	14
V. CONCLUSIONS AND OPINIONS .....	18

### **APPENDIX A**

- Philip Johnson Curriculum Vitae
- Recent Cases In Which Philip Johnson Has Testified

### **APPENDIX B**

- Questionnaire
- Interviewing Instructions
- Exhibits

### **APPENDIX C**

- Validation Summary

### **APPENDIX D**

- Verbatim from Respondents Who Name “Balance Bar”

## **REPORT OF PHILIP JOHNSON**

I, Philip Johnson, state as follows:

### **I. BACKGROUND**

1. Until January 2014, I was the Chief Executive Officer of Leo J. Shapiro and Associates, Inc., a market research and consulting firm that conducts surveys. Currently, I am the President of JJG Group, LLC, a market research company specializing in litigation related market research.
2. I have designed and supervised hundreds of surveys measuring consumer behavior, opinion, and beliefs concerning brands and products, employing a wide range of research techniques. I have given lectures before the American Bar Association (ABA), the Practising Law Institute (PLI), the American Intellectual Property Law Association (AIPLA), and the International Trademark Association (INTA) on the use of survey research in litigation. I am a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA). I have a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago. A description of my background and a list of cases in which I have offered survey evidence during the past four years are attached to Appendix A of this Report.

## **II. INTRODUCTION**

3. During February 2014, I was contacted by counsel from the law firm, Quarles & Brady LLP, on behalf of its client, GFA Brands, Inc. (“GFA”). Counsel informed me of a dispute that has arisen between GFA and Balance Bar Company (“Balance Bar”).
4. This dispute concerns GFA’s intent-to-use application (Serial Number: 85/751,520) in the U.S. Patent and Trademark Office, which seeks to register the term EARTH BALANCE in connection with “nut and seed-based snack bars” (e.g., all natural snack bars) in International Class 29. It is my understanding that Balance Bar has filed an opposition (Opposition Number: 91212477) to GFA’s application alleging that consumers who encounter Earth Balance “nut and seed-based snack bars” may falsely believe that they come from or are related to Balance Bar. In its opposition, Balance Bar claims it has developed a family of BALANCE marks that has substantial goodwill and recognition in the marketplace.<sup>1</sup>
5. Counsel asked whether I could design and conduct a study that would measure the extent to which, if at all, the Earth Balance name is or is not likely to cause confusion with Balance Bar when relevant consumers are exposed to it in connection with all natural snack bars. I agreed and proceeded to design and conduct such a study. What follows is a report on the design, execution, results, and conclusions that one can draw from this research.

---

<sup>1</sup> Notice of Opposition; Dated: September 14, 2013.



6. Materials that I have reviewed and relied upon in formulating my survey and stated opinions include the following:

- Case Pleadings:
  - Balance Bar Company (Opposer) v. GFA Brands, Inc. (Applicant); Notice of Opposition (dated: 9/14/13)
  - Balance Bar Company (Opposer) v. GFA Brands, Inc. (Applicant); Answer of GFA Brands, Inc. (dated: 10/10/13)
- Demographics:
  - Earth Balance: Simmons Analysis (dated: February 13, 2014); GFA\_EB000236 – GFA\_EB000273

### **III. METHODOLOGY**

7. Personal interviews were conducted between March 15 and 24, 2014 with 417<sup>2</sup> adults who are current or prospective purchasers of all natural snack bars. These personal interviews were conducted in shopping mall-based research facilities located in 8 markets geographically distributed throughout the United States.
8. Specifically, interviewing was conducted in each of the four major U.S. Census Regions, as follows:

<b><u>NORTHEAST</u></b>	<b><u>SOUTH</u></b>	<b><u>MIDWEST</u></b>	<b><u>WEST</u></b>
New York, NY	Raleigh-Durham, NC	Milwaukee, WI	Seattle, WA
Philadelphia, PA	Dallas, TX	Chicago, IL	Los Angeles, CA

9. Gender and age quotas were established to reflect the distribution of natural or organic food purchasers.<sup>3</sup> The gender and age distributions of survey respondents are as follows:

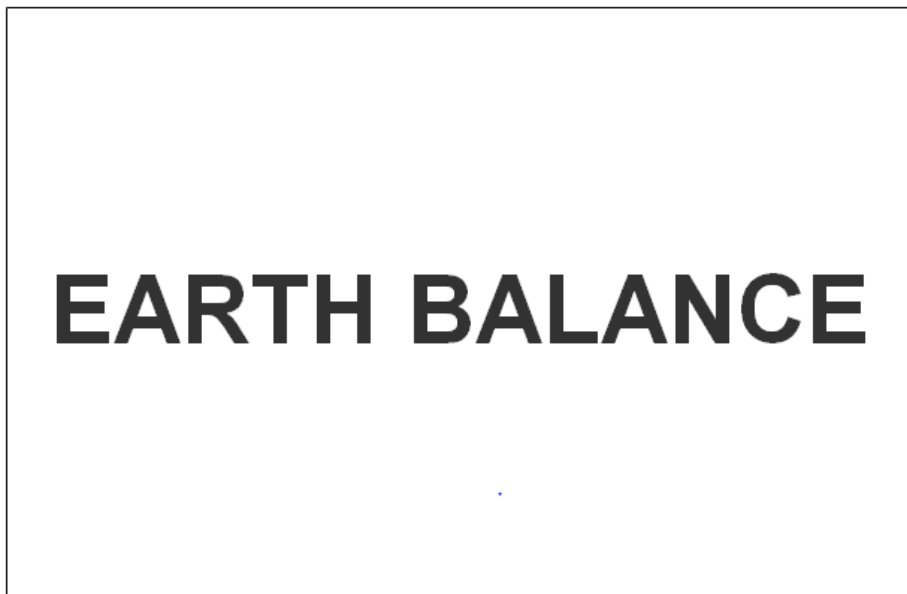
	<u>Total</u>
	(417)
ALL RESPONDENTS	<u>100%</u>
<u>Gender</u>	
Female	62%
Male	38
<u>Age Group</u>	
Between 18 and 34 Years	31%
Between 35 and 54 Years	39
55 Years and Older	30
<i>Mean Age</i>	<i>42 years</i>

<sup>2</sup> A total of 425 interviews were conducted. However, eight of these interviews have been excluded from the database due to failure in the validation process, leaving a total of 417 qualifying interviews. ID numbers for these 8 invalid interviews are: 28, 29, 127, 256, 293, 296, 384, and 410.

<sup>3</sup> Earth Balance: Simmons Analysis; Dated: February 13, 2014. (GFA\_EB000236 – GFA\_EB000273).

10. The survey employed a “test” cell and a “control” cell. Each respondent was randomly assigned to either the test cell (i.e., viewed only the test cell exhibit) or the control cell (i.e., viewed only the control cell exhibit). One-half of the interviews were conducted in the test cell (210 cases), while the other half of the interviews were conducted in the control cell (207 cases).
11. Test cell respondents were exposed to an exhibit card bearing the name “EARTH BALANCE,” while control cell respondents were exposed to an exhibit card bearing the name “EARTH BAR” in all capital letters. I selected “EARTH BAR” as the control cell name because it retains the “EARTH” portion of the mark while substituting “BALANCE” with a neutral generic term, “BAR.”
12. Reduced size images of the exhibit cards are shown below:

**Test Cell Exhibit**



**Control Cell Exhibit**

**EARTH BAR**

13. This approach of using both a test cell and control cell is the preferred survey methodology because there is a certain amount of error in any survey measurement that can be caused by sample error, guessing, the design of the study, or the construction of the questions asked. It is important to exclude these forms of error from the study results when assessing the degree of confusion that may be present. Specifically, the methodology used in this study allows one to accurately isolate and assess the effects of the alleged infringing word mark at issue when measuring any possible likelihood of confusion. Operationally, this is accomplished by taking the proportion of test cell respondents who falsely identify Balance Bar as the source or related source when shown the Earth Balance name in connection with all natural snack bars and then subtracting the corresponding proportion of control cell respondents who similarly falsely identify Balance Bar as the source or related source when shown the Earth Bar name in connection with all natural snack bars.

14. During the course of the interview, each respondent was asked who they believe is the source and whether they believe the source is related to, associated with, or has a licensing agreement with any other brands, products, or companies. In order to understand the basis for their beliefs as well as exactly what company they are referring to, respondents were then asked open-ended questions that allowed them to explain their answers in their own words and clarify each survey response.
15. This methodology follows the general pattern of the “Eveready” test, which is frequently used to measure likelihood of confusion. This design produces a very direct measure of confusion as to source or relationship.
16. In disputes about likelihood of confusion, the appropriate universe for the survey is the junior user’s market. In his treatise, Dr. Thomas McCarthy states that when designing a study to measure likelihood of confusion, the proper universe is potential consumers of the junior user’s goods or services:<sup>4</sup>

*In a traditional case claiming “forward” confusion, not “reverse” confusion, the proper universe to survey is the potential buyers of the junior user’s goods or services.*
17. In order to reach the relevant universe, interviews were conducted with adults 18 years of age and older who have either personally purchased all natural snack bars in the past four weeks or plan to personally purchase all natural snack bars in the next four weeks.

---

<sup>4</sup> McCarthy, J. Thomas. McCarthy on Trademarks and Unfair Competition, Volume 5, 32:159, pg. 32-249. 2001.

18. In order to qualify, respondents must have also met all of the following criteria:

- Must not have participated in any market research survey in the past three months.
- The respondent, or any member of his/her household, must not work for a market research or advertising firm; a manufacturer, distributor, or retailer of natural or nutritional food products; or a store in the mall where the interviewing took place.
- Must be wearing his/her eyeglasses or contact lenses at the time of the interview if he/she usually wears them when shopping or reading.

19. The screening interview proceeded as follows:

Question I:

*“Before we begin, what is your age?”*

Question II:

**“RECORD GENDER FROM OBSERVATION:”**

Question IIIa:

*“Thinking about the past four weeks, have you personally purchased...(ASK FOR EACH BELOW)?*

*...soy or veggie chips?*

*...all natural snack bars?*

*...enhanced or flavored waters?”*

Question IIIb:

*“Thinking about the next four weeks, do you personally plan to purchase...(ASK FOR EACH BELOW)?*

*...soy or veggie chips?*

*...all natural snack bars?*

*...enhanced or flavored waters?”*

Question IV:

*“Have you participated in any market research survey in the past three months?”*

Question V:

*“Do you, or does any member of your household, work for...(ASK FOR EACH)?*  
*...a market research or advertising firm?*  
*...a manufacturer, distributor, or retailer of natural or nutritional food products?*  
*...a store in this mall?”*

Question VIa:

*“Before we continue, do you usually wear eyeglasses or contact lenses when you shop or read?”*

Question VIb:

*“IF ‘YES’ IN Q.VIa, ASK: Before continuing, would you please put them on?”*

Question VII:

*“I would like to ask you a few questions in our interviewing facility. The whole process will take about five minutes of your time. Would you be willing to help us out?”*

20. Each screened and qualified respondent was escorted to a private room in the interviewing facility to conduct this interview.

21. Respondents were told:

*“Before we begin, I would like you to know that your answers and identity will be kept strictly confidential. If you don’t know the answer to any of the questions, it is okay to say so. Please do not guess. If you normally wear eyeglasses or contact lenses when you shop or read, please take them out and put them on.”*

22. Qualified respondents were then handed either the test cell exhibit or the control cell exhibit and told:

Question 1:

**“HAND RESPONDENT EXHIBIT CARD. SAY:** *This is the name of an all natural snack bar that you might see if you were shopping for such products at a store. Feel free to comment, if you wish, on anything about this.* **RECORD ANY SPONTANEOUS COMMENTS MADE.”**

23. Once the respondent was done looking at the exhibit, the interviewer was instructed to take it away and put it out of sight for the remainder of the interview.

24. The exact questions used in the interview, and the sequence in which they occurred are as follows:

Question 2a:

*“Based on what you just saw, who or what company do you believe makes the snack bar with the name that I showed you OR do you not have a belief?”*

Question 2b:

*“What makes you say that <INSERT RESPONSE GIVEN IN Q.2a> makes the snack bar with the name that I showed you? **PROBE:** Anything else?”*



Question 3a:

*“What other products or brands, if any, do you believe come from the same company who makes the snack bar with the name that I showed you OR do you not have a belief? **PROBE:** Any others?”*

Question 3b:

*“**ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q.3a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.3a> comes from whoever makes the snack bar with the name that I showed you? **PROBE:** Anything else?”*

Question 4a:

*“What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the snack bar with the name that I showed you OR do you not have a belief? **PROBE:** Any others?”*

Question 4b:

*“**ASK FOR EACH BRAND OR COMPANY GIVEN IN Q.4a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.4a> is related to, associated with, or has a licensing agreement with whoever makes the snack bar with the name that I showed you? **PROBE:** Anything else?”*

25. Finally, classification information was secured and the interview completed. Copies of the questionnaire, interviewing instructions, and exhibits used are attached to Appendix B of this Report.
26. Based on the sample size of roughly 200 cases per cell, the statistical error rate for the key measures in this study falls into the range of  $\pm 4.2\%$  for a statistic such as 10% at the 95% confidence level. In other words, one would expect that 95 times out of 100, a

measurement that was actually 10%, would accurately be represented in the data by a statistic as high as 14.2%, or as low as 5.8%.

27. Interviewing was administered and supervised, under my direction, by Survey Center, L.L.C., a company that specializes in the administration of market research surveys. Survey Center is the data collection division of Leo J. Shapiro and Associates and is a member of the Market Research Association. Interviewing in each market was conducted by independent research firms who specialize in personal interviewing in shopping malls. Interviewers in each market were trained in proper interviewing techniques and were briefed specifically on this project.
28. The survey used a “double-blind” approach, where neither the respondent nor the interviewers conducting the study were aware of the purpose of the research or the identity of the party who commissioned it. The methodology, survey design, execution, and reporting were all conducted in accordance with generally accepted standards of objective procedure and survey technique.
29. Independent validation was conducted by telephone, which involved re-establishing contact with the persons who were interviewed in the study. Based on this re-contact, overall, eight of the 425 interviews failed during the validation procedure, leaving a total of 417 qualifying interviews. These eight interviews have been excluded from the study sample, and there is no significant change in any of the study results based on this

exclusion. A detailed summary of the survey validation is attached to Appendix C of this Report.

30. The work performed to design, carry out, and report this study is covered by a billing of \$90,000. Additional time required for trial testimony or deposition, will be billed at a rate of \$7,000 per day, plus expenses.

## IV. RESULTS

### Source Question

31. Nature Valley (10%) is named most frequently by test cell respondents as the source of the snack bar with the name they were shown, followed by Kellogg's (4%), Kashi (4%), and Earth Balance (3%). Control cell respondents most frequently name Nature Valley (14%), Kellogg's (3%), and Kashi (2%) as the source. Only 3% of test cell respondents report the false belief that Balance Bar is the source of an all natural snack bar called Earth Balance. None of the control cell respondents name Balance Bar in response to this question.

*Q. 2a: "Based on what you just saw, who or what company do you believe makes the snack bar with the name that I showed you OR do you not have a belief?"*

	<u>EXHIBIT SHOWN</u>	
	<u>EARTH</u>	<u>EARTH</u>
	<u>BALANCE</u>	<u>BAR</u>
	(210)	(207)
ALL RESPONDENTS	<u>100%</u>	<u>100%</u>
<u>All Who Have A Belief About Source:</u>	<u>50%</u>	<u>47%</u>
Nature Valley	10	14
Kellogg's	4	3
Kashi	4	2
Earth Balance	3	*
<b>Balance Bar</b>	<b>3</b>	<b>--</b>
Store Brand	2	2
Clif Bar	2	2
Health/Vegan/Organic/Natural	2	1
Quaker Oats	1	2
Nutri-Grain	1	2
Nestle	1	2
Whole Foods	*	2
Other (Net)**	15	12
<u>Don't Have A Belief About Source:</u>	<u>50</u>	<u>53</u>

---

\*0.5% or fewer mentions.

\*\*Less than 2% mentions each.

### **Related Products or Brands Question**

32. Overall, test cell respondents most frequently identify Nature Valley (6%) and Kellogg's (3%) as related products or brands. Only 1% of test cell respondents report Balance Bar as a related product or brand to a snack bar called Earth Balance. None of the control cell respondents name Balance Bar as a related product or brand.

**Question 3a:**

*“What other products or brands, if any, do you believe come from the same company who makes the snack bar with the name that I showed you OR do you not have a belief? **PROBE:** Any others?”*

	EXHIBIT SHOWN	
	<u>EARTH BALANCE</u>	<u>EARTH BAR</u>
	(210)	(207)
	<u>100%</u>	<u>100%</u>
ALL RESPONDENTS		
<u>All Who Have a Belief About Related Products/Brands:</u>	<u>29%</u>	<u>33%</u>
Nature Valley	6	4
Kellogg's	3	1
Quaker Oats	2	6
Breakfast/Cereal/Granola Bars	2	4
Health/Vegan/Organic/Natural	2	2
Energy/Coconut/Natural Drinks	2	1
Cereal/Granola/Oatmeal	1	2
<b>Balance Bar</b>	<b>1</b>	<b>--</b>
Snack Foods/Chips/Cookies	*	4
Clif Bar	*	2
Other (Net)**	14	11
<u>Don't Have A Belief About Related Products/Brands:</u>	<u>71</u>	<u>67</u>

\*0.5% or fewer mentions.

\*\*Less than 2% mentions each.

**NOTE:** Table may sum to more than total due to multiple mentions by some respondents.

### **Relationship Question**

33. Just 1% of test cell respondents name Balance Bar as a related source to a snack bar called Earth Balance. None of the control cell respondents name Balance Bar as a related source.

*Question 4a:*

*“What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the snack bar with the name that I showed you OR do you not have a belief?  
**PROBE:** Any others?”*

	EXHIBIT SHOWN	
	<u>EARTH BALANCE</u>	<u>EARTH BAR</u>
ALL RESPONDENTS	(210) <u>100%</u>	(207) <u>100%</u>
<u>All Who Have a Belief About Related Source:</u>	<u>16%</u>	<u>21%</u>
Kellogg’s	3	3
Nature Valley	2	4
Quaker Oats	2	2
Whole Foods	1	1
Post	1	1
Trader Joe’s	1	1
Health/Vegan/Organic/Natural	1	1
Nutri-Grain	1	*
<b>Balance Bar</b>	<b>1</b>	<b>--</b>
Kashi	*	1
Nabisco	*	1
Luna Bar	*	1
Cereal/Granola/Oatmeal	*	1
Clif Bar	--	1
GNC	--	1
Nestle	--	1
Fiber One	--	1
Other (Net)**	4	5
<u>Don’t Have A Belief About Related Source:</u>	<u>84</u>	<u>79</u>

---

\*0.5% or fewer mentions.

\*\*Single mentions each.

**NOTE:** Table may sum to more than total due to multiple mentions by some respondents.

### **Summary Table for “Balance Bar” Mentions**

34. When the results to all survey questions relating to source, related products/brands, and relationship are considered together on an unduplicated basis, overall just 4% of test cell respondents report the false belief that Balance Bar is the source or a related source when they are exposed to the Earth Balance name in connection with all natural snack bars. None of the control cell respondents report the false belief that Balance Bar is the source or a related source when they are exposed to the Earth Bar name in connection with all natural snack bars.<sup>5</sup>

### **Net of Q.2a-4a**

	<u>EXHIBIT SHOWN</u>		<u>Adjusted Net</u>
	<u>EARTH BALANCE</u>	<u>EARTH BAR</u>	
ALL RESPONDENTS	(210) <u>100%</u>	(207) <u>100%</u>	
<b><u>Total “Balance Bar” Identification (Net):</u></b>	<b><u>4%</u></b>	<b><u>--%</u></b>	
In Source	3	--	
In Related Products/Brands, But Not Source	*	--	
In Relationship, But Not Source or Related Products/Brands	1	--	
<b><u>Adjusted Findings</u></b>			
Adjusted Net of Test – Control	<b>4%</b>	-	<b>0% = <u>4%</u></b>

<sup>5</sup> Verbatim comments from respondents who name “Balance Bar” are attached to Appendix D of this Report.

## **V. CONCLUSIONS AND OPINIONS**

35. Based on the results of this research, when current and prospective purchasers of all natural snack bars are exposed to the Earth Balance word mark in connection with all natural snack bars, there is no likelihood of confusion that these consumers will falsely believe this snack bar comes from or is related to Balance Bar.
36. Overall, it is my opinion that GFA's use of the Earth Balance name in connection with all natural snack bars causes no likelihood of confusion with Balance Bar.

Pursuant to 28 U.S.C., Section 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 16, 2014 in Friday Harbor, Washington.



---

Philip Johnson



## **APPENDIX A**

- Philip Johnson Curriculum Vitae
- Recent Cases In Which Philip Johnson Has Testified

# JJG Group LLC

---

---

## Litigation Research Services

### **PHILIP JOHNSON**

### **CURRICULUM VITAE**

Philip Johnson is the former Chief Executive Officer of Leo J. Shapiro & Associates, L.L.C., a Chicago-based market research and behavioral consulting company. Currently, Mr. Johnson is the President of JJG Group, LLC, a market research company specialized in providing litigation-related research services.

Mr. Johnson has designed and supervised hundreds of surveys measuring consumer behavior and opinion, employing a wide range of research techniques. His area of expertise is in the use of survey research as a tool in litigation, including jury selection and trademark disputes.

Mr. Johnson has offered testimony regarding survey evidence on over eighty occasions in both Federal and State courts. In addition, he has offered survey research in matters before the Federal Trade Commission, The Food and Drug Administration, the Patent and Trademark Office, and the Trademark Trial and Appeal Board. Mr. Johnson has designed, conducted, and reported survey evidence on behalf of both plaintiffs and defendants in various cases. The topics covered in these litigation related surveys include matters related to likelihood of confusion, secondary meaning, genericness, dilution, false advertising, change of venue, and unfair competition.

Part of Mr. Johnson's training has been through working with Dr. Leo J. Shapiro, the Founder of Leo J. Shapiro & Associates, L.L.C.; the late Dr. Philip M. Hauser, a former Director of the U. S. Census

**Philip Johnson, JJG GROUP LLC, PO BOX 1909, FRIDAY HARBOR, WA 98250**

Bureau; and the late Dr. Hans Zeisel, who made significant contributions in the application of social science to the solution of legal questions.

Mr. Johnson has given lectures before the American Bar Association (ABA) and the Practising Law Institute (PLI) on the use of survey research in litigation. He is a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA).

Mr. Johnson has a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago.



---

Litigation Research Services

**RECENT CASES IN WHICH PHILIP JOHNSON HAS  
TESTIFIED OR OFFERED SURVEY EVIDENCE AT TRIAL...**

NOVEMBER 2013	GLOBEFILL INCORPORATED v. ELEMENTS SPIRITS INCORPORATED AND KIM BRANDI United States District Court for the Central District of California Likelihood of Confusion
SEPTEMBER 2013	SHEETZ OF DELAWARE, INC. v. DOCTOR'S ASSOCIATES, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board Genericness
JUNE 2013	KRAFT FOODS GROUP BRANDS LLC v. CRACKER BARREL OLD COUNTRY STORE, INC., CBOCS PROPERTIES, INC., AND JOHN DOES 1-10 United States District Court for the Northern District of Illinois (Eastern Division) Likelihood of Confusion
APRIL 2013	PROMARK BRANDS INC. v. GFA BRANDS, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board Likelihood of Confusion
DECEMBER 2012	MOBILEMEDIA IDEAS LLC v. APPLE INC. United States District Court for the District of Delaware Patent Infringement
OCTOBER 2012	MIXED CHICKS LLC v. SALLY BEAUTY SUPPLY LLC United States District Court for the Central District of California Likelihood of Confusion
NOVEMBER 2009	FAIR ISAAC CORPORATION v. EQUIFAX, INC., ET AL. United States District Court for the District of Minnesota Secondary Meaning

JULY 2009

THE SCOTTS COMPANY LLC v. CENTRAL GARDEN & PET  
COMPANY AND GULFSTREAM HOME & GARDEN, INC.  
United States District Court for the  
Southern District of Ohio  
False Advertising

JULY 2009

LUMBER LIQUIDATORS, INC. v. STONE MOUNTAIN CARPET  
MILLS, INC. d/b/a THE FLOOR TRADER  
United States District Court for the  
Eastern District of Virginia  
Likelihood of Confusion

### **DEPOSITION TESTIMONY OF PHILIP JOHNSON THAT HAS NOT BEEN OFFERED AT TRIAL...**

JANUARY 2014	PODS ENTERPRISES, INC. v. U-HAUL INTERNATIONAL, INC. United States District Court for the Middle District of Florida (Tampa Division)
OCTOBER 2013	JEFFREY SORENSEN v. WD-40 COMPANY United States District Court for the Northern District of Illinois (Western Division)
AUGUST 2013	MOBILEMEDIA IDEAS LLC v. RESEARCH IN MOTION LIMITED AND RESEARCH IN MOTION CORPORATION United States District Court for the Eastern District of Texas (Marshall Division)
MARCH 2013	FAGE USA DAIRY INDUSTRY, INC., ET AL. v. GENERAL MILLS, INC., ET AL. United States District Court for the Northern District of New York
MARCH 2013	GENERAL MILLS, INC. ET AL. v. FAGE USA DAIRY INDUSTRY, INC. ET AL. United States District Court for the District of Minnesota
FEBRUARY 2013	SEXY HAIR CONCEPTS, LLC v. CONAIR CORPORATION United States District Court for the Central District of California
JANUARY 2013	BALANCE BAR COMPANY v. GFA BRANDS, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
NOVEMBER 2012	LUV N' CARE, LTD. AND ADMAR INTERNATIONAL, INC. v. MAYBORN USA, INC. United States District Court for the Southern District of New York
NOVEMBER 2012	LUV N' CARE, LTD. v. JACKEL INTERNATIONAL LIMITED Fourth Judicial District Court for the State of Louisiana

OCTOBER 2012	EMERSON ELECTRIC CO. v. ANAHEIM MANUFACTURING CO. United States International Trade Commission Washington, D.C.
OCTOBER 2012	FARM FLEET SUPPLIES, INC. v. BLAIN SUPPLY, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
SEPTEMBER 2012	THE REINALT-THOMAS CORPORATION d/b/a DISCOUNT TIRE v. AKH COMPANY, INC. United States District Court for the District of Arizona
APRIL 2012	SEXY HAIR CONCEPTS, LLC v. CONAIR CORPORATION United States District Court for the Central District of California
AUGUST 2011	MCDONALD'S CORPORATION v. MCSWEET, LLC United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
JANUARY 2011	TECHNOLOGY PATENTS LLC v. DEUTSCHE TELEKOM AG, ET AL. United States District Court for the District of Maryland
DECEMBER 2010	BLAIN SUPPLY, INC. v. RUNNING SUPPLY, INC. United States District Court for the Western District of Wisconsin
DECEMBER 2010	LUCENT TECHNOLOGIES, INC. v. MICROSOFT CORPORATION United States District Court for the Southern District of California
JULY 2010	ROSETTA STONE LTD. v. TOPICS ENTERTAINMENT, INC. United States District Court for the Eastern District of Virginia
APRIL 2010	LA QUINTA WORLDWIDE, LLC v. QUINTA REAL PROMOCION, S.A. de C.V. United States District Court for the District of Arizona (Tucson Division)
MARCH 2010	THE NORTH FACE APPAREL CORPORATION v. THE SOUTH BUTT, LLC United States District Court for the Eastern District of Missouri (St. Louis)

MARCH 2010	THINK VILLAGE-KIWI, LLC v. ADOBE SYSTEMS, INC. AND ADOBE MACROMEDIA SOFTWARE LLC United States District Court for the Northern District of California
SEPTEMBER 2009	FLOWERS BAKERIES BRANDS, INC. v. INTERSTATE BAKERIES CORPORATION United States District Court for the Northern District of Georgia
FEBRUARY 2009	CRICKET COMMUNICATIONS, INC. v. HIPCRICKET, INC. United States District Court for the Western District of Washington



## **APPENDIX B**

- Questionnaire
- Interviewing Instructions
- Exhibits

## **QUESTIONNAIRE**

HIGHLY CONFIDENTIAL

Hello, my name is \_\_\_\_\_. I work for Survey Center, and we are doing an opinion study. Let me assure you that we are not selling anything. This is strictly for research purposes only.

**SCREEN:**

I. Before we begin, what is your age? **RECORD AGE:** \_\_\_\_\_

( ) UNDER 18 YEARS...**TALLY AND TERMINATE.**

( ) BETWEEN 18 AND 34 YEARS...**CHECK QUOTAS AND CONTINUE.**

( ) BETWEEN 35 AND 54 YEARS...**CHECK QUOTAS AND CONTINUE.**

( ) 55 YEARS AND OLDER...**CHECK QUOTAS AND CONTINUE.**

( ) REFUSED...**TALLY AND TERMINATE.**

II. **RECORD GENDER FROM OBSERVATION:**

( ) MALE...**CHECK QUOTAS AND CONTINUE.**

( ) FEMALE...**CHECK QUOTAS AND CONTINUE.**

IIIa. Thinking about the past four weeks, have you personally purchased...(ASK FOR EACH BELOW)?

b. Thinking about the next four weeks, do you personally plan to purchase...(ASK FOR EACH BELOW)?

	IIIa. Past Four Weeks Purchase?		IIIb. Next Four Weeks Purchase?	
...soy or veggie chips?	( ) NO	( ) YES	( ) NO	( ) YES
...all natural snack bars?	( ) NO	( ) YES	( ) NO	( ) YES
...enhanced or flavored waters?	( ) NO	( ) YES	( ) NO	( ) YES

**IF RESPONDENT SAYS "NO" TO PERSONALLY PURCHASING ALL NATURAL SNACK BARS IN Q.IIIa AND Q.IIIb, TALLY AND TERMINATE. IN ORDER TO QUALIFY FOR INTERVIEW, RESPONDENT MUST HAVE EITHER PERSONALLY PURCHASED ALL NATURAL SNACK BARS IN THE PAST FOUR WEEKS OR MUST PLAN TO PERSONALLY PURCHASE ALL NATURAL SNACK BARS IN THE NEXT FOUR WEEKS.**

IV. Have you participated in any market research survey in the past three months?

( ) NO...**IF NO, CONTINUE.**

( ) YES...**IF YES, TALLY AND TERMINATE.**

- V. Do you, or does any member of your household, work for...(ASK FOR EACH)?
- ...a market research or  
advertising firm? ( )NO ( )YES...IF YES, TALLY AND TERMINATE.
- ...a manufacturer, distributor  
or retailer of natural or  
nutritional food products? ( )NO ( )YES...IF YES, TALLY AND TERMINATE.
- ...a store in this mall? ( )NO ( )YES...IF YES, TALLY AND TERMINATE.
- VIa. Before we continue, do you usually wear eyeglasses or contact lenses when you shop  
or read?
- ( )NO...IF NO, SKIP TO Q.VII. ( )YES...IF YES, CONTINUE WITH Q.VIb.
- b. IF "YES" IN Q.VIa, ASK: Before continuing, would you please put them on?
- ( )NO...IF NO, TALLY AND TERMINATE. ( )YES...IF YES, CONTINUE WITH Q.VII.
- VII. I would like to ask you a few questions in our interviewing facility. The whole  
process will take about five minutes of your time. Would you be willing to help us  
out? ( )NO...IF NO, TALLY AND TERMINATE. ( )YES...IF YES, CONTINUE.

**QUESTIONNAIRE:**

**ESCORT RESPONDENT TO THE INTERVIEWING FACILITY.**

**SAY:** Before we begin, I would like you to know that your answers and identity will be kept strictly confidential. If you don't know the answer to any of the questions, it is okay to say so. Please do not guess. If you normally wear eyeglasses or contact lenses when you shop or read, please take them out and put them on.

**ROTATE WHICH EXHIBIT CARD IS SHOWN IN BETWEEN RESPONDENTS.**

**"X" HERE WHICH EXHIBIT CARD IS SHOWN:**      ( )MM              ( )TT

1.      **HAND RESPONDENT EXHIBIT CARD. SAY:** This is the name of an all natural snack bar that you might see if you were shopping for such products at a store. Feel free to comment, if you wish, on anything about this.      **RECORD ANY SPONTANEOUS COMMENTS MADE.**

---



---



---

( )NO SPONTANEOUS COMMENTS

**WHEN RESPONDENT IS DONE LOOKING AT EXHIBIT CARD, TAKE BACK EXHIBIT CARD, AND PUT IT OUT OF SIGHT FOR THE REMAINDER OF THE INTERVIEW.**

- 2a. Based on what you just saw, who or what company do you believe makes the snack bar with the name that I showed you OR do you not have a belief?

( )DON'T HAVE A BELIEF...**SKIP TO Q.3a.**

---

---

---

- b. What makes you say that <INSERT RESPONSE GIVEN IN Q.2a> makes the snack bar with the name that I showed you? **PROBE:** Anything else?

---

---

---

( )DON'T KNOW/NOT ANSWERING

3a. What other products or brands, if any, do you believe come from the same company who makes the snack bar with the name that I showed you OR do you not have a belief? **PROBE:** Any others?

( )DON'T HAVE A BELIEF...**SKIP TO Q.4a.**

b. **ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q.3a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.3a> comes from whoever makes the snack bar with the name that I showed you? **PROBE:** Anything else?

( )DON'T KNOW/NOT ANSWERING

a. What Product or Brand?

b. What Makes You Say That?

---



---



---



---



---



---



---



---



---



---



---



---

4a. What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the snack bar with the name that I showed you OR do you not have a belief? **PROBE:** Any others?

( )DON'T HAVE A BELIEF...SKIP TO "CLASSIFICATION PAGE."

b. **ASK FOR EACH BRAND OR COMPANY GIVEN IN Q.4a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.4a> is related to, associated with, or has a licensing agreement with whoever makes the snack bar with the name that I showed you? **PROBE:** Anything else?

( )DON'T KNOW/NOT ANSWERING

a. What Brand or Company?

b. What Makes You Say That?

---

---

---

---

---

---

---

---

---

---

---

---



**CLASSIFICATION PAGE**

In order to be counted as a complete survey, I need to have a phone number where you can be reached only for the purpose of a verifier calling to confirm that you participated in the study. May I please have a phone number where you can be reached? This verification call would take less than a minute of your time. (\_\_\_\_)\_\_\_\_\_

Is this your ( )HOME ( )BUSINESS or ( )CELL phone? Thank you.

NAME: \_\_\_\_\_ PHONE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_ CITY/STATE: \_\_\_\_\_

ZIP CODE: \_\_\_\_\_ INTERVIEWER: \_\_\_\_\_ DATE: \_\_\_\_\_

FIELD SERVICE: \_\_\_\_\_ MALL: \_\_\_\_\_

**INTERVIEWER CERTIFICATION**

This certifies I have personally conducted this interview with the above named respondent to the best of my ability and in compliance with the interviewing instructions. I have recorded, as fully as possible, the respondent's complete answers to the above questions.

SIGNATURE OF INTERVIEWER: \_\_\_\_\_

PRINTED NAME OF INTERVIEWER: \_\_\_\_\_

## **INTERVIEWING INSTRUCTIONS**

HIGHLY CONFIDENTIAL

# **Survey Center**

Marketing Research

## **SNACK BAR STUDY**

### **INTERVIEWING INSTRUCTIONS**

March 2014

**Each interviewer working on this job must be briefed by a supervisor. The briefing must consist of having these instructions read in their entirety. The supervisor must then witness each interviewer conducting a practice run-through on the questionnaire.**

#### **MATERIALS:**

- 104 Hard Copy Screeners
- Terminate Tally Sheet
- Exhibit Cards:
  - Exhibit MM
  - Exhibit TT

## **SCREENING CRITERIA**

- Respondent must be 18 years of age and older.
- Respondent must have either personally purchased all natural snack bars in the past four weeks or must plan to personally purchase all natural snack bars in the next four weeks.
- Respondent must not have participated in any market research survey in the past three months.
- Respondent, or any member of his/her household, must not work for a market research or advertising firm; a manufacturer, distributor or retailer of natural or nutritional food products; or a store in the mall.
- Respondent must be wearing his/her eyeglasses or contact lenses if he/she usually wears them while shopping or reading.

## **QUOTA**

- Your total quota is **52** completed interviews divided by which exhibit card is shown, age group, and gender as shown below.
- Each respondent sees only one exhibit card: either Exhibit MM or Exhibit TT. Rotate which exhibit card is shown between respondents. The other exhibit card not being shown must be out of respondent's sight during the interview.

	<b><u>AGE GROUP</u></b>	<b><u>MALE</u></b>	<b><u>FEMALE</u></b>	<b><u>TOTAL</u></b>
<b>EXHIBIT MM</b>	18-34 Years	3	5	<b>8</b>
	35-54 Years	4	6	<b>10</b>
	55+ Years	3	5	<b>8</b>
	<b>SUBTOTAL</b>	<b>10</b>	<b>16</b>	<b>26</b>
<b>EXHIBIT TT</b>	18-34 Years	3	5	<b>8</b>
	35-54 Years	4	6	<b>10</b>
	55+ Years	3	5	<b>8</b>
	<b>SUBTOTAL</b>	<b>10</b>	<b>16</b>	<b>26</b>
	<b>GRAND TOTAL</b>	<b>20</b>	<b>32</b>	<b>52</b>

- No interviewer should complete more than 8 completed interviews using Exhibit MM or 8 completed interviews using Exhibit TT.

## **GENERAL INTERVIEWING INSTRUCTIONS**

- Respondents may be screened on the mall floor, but must be interviewed in a private room in the interviewing facility.
- Interviewer must use the N<sup>th</sup> systematic sampling process to determine which respondent to approach. Interviewer should count the number of people that walks past him/her within a 30-second time frame. Take the number of people and divide by two; this quotient will be your N<sup>th</sup> select record. Interviewer must approach and screen every N<sup>th</sup> visitor.
- Upon reaching the screening site, screen each person, regardless of race, dress, appearance, or any other consideration, who appears to meet the quota requirements. Once a qualified respondent has been interviewed, repeat the screening process described above to locate the next qualified respondent.
- Interview only one respondent in a group.
- Interview only one respondent at a time.
- No respondent may be present while another respondent is being interviewed.
- Do not interview respondents who do not understand English.
- Do not interview respondents who have difficulty hearing.
- Do not interview anyone who you know personally.
- There is no smoking, eating, or gum chewing allowed while interviewing.
- Follow all instructions on the questionnaire.
- Read all questions and record all responses verbatim. No paraphrasing is allowed. Be sure to record every word of a response exactly the way it is spoken.
- Probe and clarify where indicated for a complete response.
- If a respondent does not hear or understand a question, simply repeat it.
- Complete the questionnaire on a computer using the website link we have provided.
- Each interviewer's work will be independently validated. Attempt to secure a name and phone number from every respondent.
- Interviewer must type his/her full name in the space indicated for the interviewer certification. No interviews will be accepted that are not certified.
- Ask the respondent to put on eyeglasses if he/she usually wears them while shopping or reading. If he/she wears eyeglasses or contact lenses when shopping or reading but doesn't have them with him/her at the time of the interview or refuses to put them on, the interview must be terminated.

## **SPECIFIC INTERVIEWING INSTRUCTIONS**

- Escort respondent to interviewing facility. Ask respondent to put on his/her eyeglasses or contact lenses if he/she normally wears them while shopping or reading.
- Each respondent sees only one exhibit card during the course of the interview: either Exhibit MM or Exhibit TT. The other exhibit card not being shown must be out of respondent's sight during the interview.
- Rotate which exhibit card is shown between respondents and record in survey.
- In Question 1, hand respondent the exhibit card and allow him/her to look at it for as long as he/she would like. Record any spontaneous comments the respondent makes. When respondent is done looking at exhibit card, take back exhibit card, and put it out of sight for the remainder of the interview. Respondent should not refer to exhibit card when answering subsequent questions.
- Ask Question 2a of all respondents.
- If respondent says "Don't Have A Belief" in response to Question 2a, then skip to Question 3a.
- If respondent names a company in response to Question 2a, continue with Question 2b. Probe and clarify for a complete response.
- Ask Question 3a of all respondents.
- If respondent says "Don't Have A Belief" in response to Question 3a, then skip to Question 4a.
- If respondent names a product or brand in response to Question 3a, continue with Question 3b. Probe and clarify for a complete response.
- Ask Question 3b for each product or brand respondent gives in Question 3a.
- Ask Question 4a of all respondents.
- If respondent says "Don't Have A Belief" in response to Question 4a, then skip to "Classification Page."
- If respondent names a brand or company in response to Question 4a, continue with Question 4b. Probe and clarify for a complete response.
- Ask Question 4b for each brand or company respondent gives in Question 4a.
- Secure classification information and thank respondent for participating.

## **EXHIBITS**

HIGHLY CONFIDENTIAL

TEST

# EARTH BALANCE



CONTROL

**EARTH BAR**

## **APPENDIX C**

- Validation Summary



**Snack Bar Study**  
**Validation Summary**

<u>Total # of Respondents:</u>	<u>425</u>
<u>Attempted/Reached:</u>	<u>216</u>
Valid:	208
Invalid:	8
<u>Attempted/Not Reached:</u>	<u>209</u>

The Bates ID numbers for the invalid respondents are as follows: #28, #29, #127, #256, #293, #296, #384, and #410.

## **APPENDIX D**

- Verbatim From Respondents Who Name “Balance Bar”

## All Who Name "Balance Bar"

### Test Cell (n=9)

#### **QID 00005**

- Q2a. Balance Bar  
Q2b. It had the word Balance in the name.

#### **QID 00095**

- Q4a1. Balance Bar  
Q4b1. Because the word Balance makes me think that it is affiliated with the same company or companies.

#### **QID 00141**

- Q3a2. Balance Bar  
Q3b2. It has Balance in the name.

#### **QID 00184**

- Q4a1. Balance Bars  
Q4b1. Because it's in the name.

#### **QID 00245**

- Q2a. Whoever makes Balance Bar.  
Q2b. Because the name Balance is in it, so that's where my mind will go.

#### **QID 00267**

- Q2a. The Balance Bar company.  
Q2b. It says "Balance" on it, so it might be affiliated with that company. I have seen bars like that before.

#### **QID 00280**

- Q2a. Balance Bars  
Q2b. Because it says Balance on it and Balance Bars sound like they would be affiliated with this.

#### **QID 00353**

- Q2a. I would think it would be made by the same company that makes Balance Bar.  
Q2b. It just seems like a product that would be manufactured by that company.

#### **QID 00424**

- Q2a. I would think it was made by Balance Bar.  
Q2b. It has the name Balance in it.  
Q3a1. Balance Bar  
Q3b1. The name.